

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

TAMMY L. CASTLEBERRY

Claimant

VS.

PROGRESSIVE HOME HEALTH CARE;

ORENDA CORPORATION

Respondents

AND

UNITED WISCONSIN INSURANCE CO.;

SFM MUTUAL INSURANCE COMPANY

Insurance Carriers

Docket No. 1,061,912

ORDER

STATEMENT OF THE CASE

Respondent Progressive Home Health Care and its insurance carrier, United Wisconsin Insurance Co. (respondent), requested review of the June 24, 2013, preliminary hearing Order entered by Administrative Law Judge Nelsonna Potts Barnes. Dale Slape of Wichita, Kansas, appeared for claimant. Vincent Burnett of Wichita, Kansas, appeared for respondent. Brandon Lawson of Kansas City, Missouri, appeared for Orenda Corporation and its insurance carrier, SFM Mutual Insurance Company (Orenda).

The Administrative Law Judge (ALJ) found claimant sustained an accidental injury on July 3, 2012, arising out of and in the course of her employment. Further, the ALJ found the accident was the prevailing factor causing claimant's injury, present condition, and need for further treatment. The ALJ awarded claimant temporary total disability benefits and the selection of an authorized treating physician.

The record on appeal is the same as that considered by the ALJ and consists of the transcript of the April 30, 2013, Preliminary Hearing and the exhibits, together with the pleadings contained in the administrative file.

ISSUES

Respondent argues claimant failed to carry her burden of proof that she sustained an injury by accident arising out of and in the course of her employment with respondent; therefore, pursuant to K.S.A. 2012 Supp. 44-508(f)(2), claimant did not sustain a compensable injury. Additionally, respondent maintains claimant has a prior history of upper extremity pain, and her work was not the prevailing factor for her alleged injury, medical condition, and resulting disability.

Claimant contends the ALJ's Order should be affirmed as the evidence shows claimant met her burden of proving an injury arising out of and in the course of employment. Further, claimant argues her previous complaints did not require continuing treatment past 2006 and were resolved prior to the injury of July 3, 2012. Claimant argues the multiple traumas and continuing work of July 3, 2012, are the prevailing factor for her injury and need for medical treatment.

Orenda argues that at the time of the accident, claimant was no longer an employee of Orenda, but an employee of respondent. Orenda maintains there is no evidence claimant suffered a repetitive trauma working for Orenda or that such repetitive trauma was the prevailing factor in her need for medical treatment. Orenda requests the ALJ's Order be affirmed.

The issues for the Board's review are:

1. Did claimant sustain an injury arising out of and in the course of her employment with respondent?
2. What was the prevailing factor in claimant's injury and need for medical treatment?

FINDINGS OF FACT

Claimant was employed by Care 2000 (Orenda) for approximately six years as a home health aide. In this position, claimant visited her assigned clients and provided home health care, which at times required heavy lifting, pulling, and transferring of non ambulatory patients. Beginning in June of 2012, Orenda went out of business and most of their employees and patients transferred to respondent. This transfer process was complete by July 1, 2012. Claimant's employment with respondent began June 18, 2012.

On July 3, 2012, claimant testified she was assisting a paralyzed client to rise from bed by sliding him onto a sliding board when she felt a pop in her left arm. She continued to assist the client throughout her shift, and by the time she was finished her arm had swollen. Claimant further stated she had pain from her hand into her neck and could

barely move her left arm. Claimant testified she had some soreness in her arm a few days prior to July 3, 2012, but it was more “like [a] pulled muscle feeling.”¹

Claimant notified Betty Harmon, respondent’s human resources director, on July 3, 2012, concerning her arm pain. Ms. Harmon testified claimant informed her the arm pain had been occurring for approximately a month, including that day. Ms. Harmon referred claimant to Orenda because a month prior claimant would have been Orenda’s employee.

Ms. Harmon testified respondent had no record of claimant having been an employee on July 3, 2012. She stated her records showed claimant’s last date of employment as June 29, 2012. Further, respondent had no record of care for the paralyzed client on the mornings of July 1-3, 2012. Respondent could not verify who cared for the client during this time frame. Claimant stated she was not paid for those hours; however, she testified she did provide care for the client on the mornings of July 2-3, 2012, although she could not produce records of the hours worked on those dates.

After Ms. Harmon directed claimant to Orenda, claimant contacted Kim Troyer, a former employee of Orenda who was by that time an employee with respondent. Ms. Troyer referred claimant to Same Day Care for treatment.

Dr. Jeffery Thode at Same Day Care examined claimant on July 3, 2012. Claimant presented with left arm swelling and pain. Dr. Thode further noted that “she has had this for three weeks.”² There is no mention of a specific incident occurring on July 3, 2012, in his notes. Dr. Thode diagnosed claimant with left lateral epicondylitis³ and prescribed prednisone and pain medication. He recommended claimant wear a tennis elbow brace, which she later stopped wearing as it increased her pain. He restricted claimant’s work to no use of her left arm.

Claimant followed up with Dr. Thode on July 10, 2012, at which time she complained of pain in her neck, headache, dizziness, and pain in her right arm. Dr. Thode determined she had left lateral epicondylitis, sinusitis, and hypertensive urgency. Claimant was given an injection to her left elbow and taken off work. Dr. Thode again examined claimant on July 13, 2012, at which time he referred claimant to physical therapy and allowed her to return to work with restrictions on lifting, pushing, pulling, reaching, and repetitive use of the left arm. Claimant testified that although Dr. Thode “did not want to,”⁴ he released her

¹ P.H. Trans. at 32.

² P.H. Trans., Resp. Ex. 1 at 84.

³ Dr. Thode’s report actually states claimant suffers “right lateral epicondylitis.” It appears the use of “right” is a clerical error as Dr. Thode refers to claimant’s “left lateral epicondylitis” in all subsequent reports.

⁴ P.H. Trans. at 28.

from restrictions to return to work at her request. Claimant explained that although she continued to have pain, she could not afford to be without work.

By July 27, 2012, claimant had followed up with Same Day Care multiple times for ongoing problems with her left arm. Claimant has not received medical treatment since her last visit with Dr. Thode. She claimed she could not afford to pay for treatment.

Claimant's counsel referred her to Dr. Pedro Murati, a board certified independent medical examiner, for an independent medical evaluation on September 4, 2012. Claimant complained of left hand to shoulder swelling and pain from her left wrist to her elbow, shoulder, and neck. She indicated to Dr. Murati that severe neck pain caused headaches, and she had numbness throughout her entire left arm, with problems in her right arm. Claimant denied any previous significant injuries to her left elbow prior to her work-related injury sustained on July 3, 2012. Medical records reviewed by Dr. Murati listed several incidents of neck and shoulder pain prior to 2006.

Dr. Murati diagnosed claimant with bilateral carpal tunnel syndrome, left lateral epicondylitis and myofascial pain syndrome of the left shoulder girdle extending into the cervical paraspinal. He recommended the appropriate physical therapy, cortisone injections, and anti-inflammatory and pain medications as needed. He further noted claimant should wear a tennis elbow splint during all waking hours, and "if conservative care fails then a referral to an upper extremity orthopedic specialist is in order."⁵ Dr. Murati stated claimant's diagnoses were within all reasonable medical probability a direct result from the work-related injury of July 3, 2012.

Regarding prevailing factor, Dr. Murati noted in his independent medical evaluation:

This claimant sustained repetitive traumas at work which resulted in left elbow, left shoulder and neck pain. This claimant is a young person. Her smoking habit, although deleterious, is not known as a direct cause of any of her diagnoses. There is no history or documentation of any hobbies or activities outside of work. Apparently all cervical preexisting treatment stops 6 years prior to this visit. There are no additional medical records after 2006 for cervical complaints. Therefore, it is under all medical reasonable certainty and probability the prevailing factor in all of the above-named conditions are the repetitive traumas sustained as a result of her work at [respondent].⁶

Dr. John Estivo, an orthopedic surgeon, performed an independent medical evaluation of claimant on November 9, 2012, at respondent's request. Claimant presented with cervical spine pain and numbness and tingling to the upper extremities with left upper

⁵ P.H. Trans., Resp. Ex. 1 at 47.

⁶ P.H. Trans., Resp. Ex. 1 at 48.

extremity pain and numbness. After reviewing claimant's prior medical records and performing a physical examination, Dr. Estivo concluded:

It is my opinion [claimant] is continuing to be dealing with chronic cervical spine pain and left upper extremity pain and numbness, all related to her preexisting multiple injuries in the past. She may have had a temporary aggravation to her preexisting chronic cervical spine pain and left arm symptoms when she was working for [Orenda], but I would not relate her symptoms to the brief time that she worked for [respondent].

...

In my opinion, there has been no new injury that [claimant] has experienced while working for [respondent].

...

It is my opinion [claimant] is dealing with an aggravation of a preexisting condition. The prevailing factor regarding her symptoms would be the preexisting chronic cervical spine pain and upper extremity pain and numbness she has been experiencing for many years prior to her recent injury claim. In my opinion, [claimant] does not require any medical treatment in relation to the injury claim of 07/03/2012. She does not require any restrictions in relation to the claim of 07/03/2012. She has not incurred any impairment in relation to the claim of 07/03/2012.⁷

Claimant has not worked since July 2012. Respondent was unable to accommodate her restrictions.

PRINCIPLES OF LAW

K.S.A. 2012 Supp. 44-501b provides, in part:

(c) The burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which claimant's right depends. In determining whether claimant has satisfied this burden of proof, the trier of fact shall consider the whole record

K.S.A. 2012 Supp. 44-508 provides, in part:

(d) "Accident" means an undesigned, sudden and unexpected traumatic event, usually of an afflictive or unfortunate nature and often, but not necessarily, accompanied by a manifestation of force. An accident shall be identifiable by time

⁷ P.H. Trans., Resp. Ex. 1 at 7-8.

and place of occurrence, produce at the time symptoms of an injury, and occur during a single work shift. The accident must be the prevailing factor in causing the injury. "Accident" shall in no case be construed to include repetitive trauma in any form.

. . .

(2) An injury is compensable only if it arises out of and in the course of employment. An injury is not compensable because work was a triggering or precipitating factor. An injury is not compensable solely because it aggravates, accelerates or exacerbates a preexisting condition or renders a preexisting condition symptomatic.

. . .

(B) An injury by accident shall be deemed to arise out of employment only if:

- (i) There is a causal connection between the conditions under which the work is required to be performed and the resulting accident; and
- (ii) the accident is the prevailing factor causing the injury, medical condition, and resulting disability or impairment.

(3) (A) The words "arising out of and in the course of employment" as used in the workers compensation act shall not be construed to include:

- (i) Injury which occurred as a result of the natural aging process or by the normal activities of day-to-day living;
- (ii) accident or injury which arose out of a neutral risk with no particular employment or personal character;
- (iii) accident or injury which arose out of a risk personal to the worker; or
- (iv) accident or injury which arose either directly or indirectly from idiopathic causes.

. . .

(g) "Prevailing" as it relates to the term "factor" means the primary factor, in relation to any other factor. In determining what constitutes the "prevailing factor" in a given case, the administrative law judge shall consider all relevant evidence submitted by the parties.

(h) "Burden of proof" means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record unless a higher burden of proof is specifically required by this act.

By statute, preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.⁸ Moreover, this review of a preliminary hearing order has been determined by only one Board Member, as permitted

⁸ K.S.A. 44-534a; see *Quandt v. IBP*, 38 Kan. App. 2d 874, 173 P.3d 1149, *rev. denied* 286 Kan. 1179 (2008); *Butera v. Fluor Daniel Constr. Corp.*, 28 Kan. App. 2d 542, 18 P.3d 278, *rev. denied* 271 Kan. 1035 (2001).

by K.S.A. 2012 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board as it is when the appeal is from a final order.⁹

ANALYSIS

1. Did claimant sustain an injury arising out of and in the course of her employment with respondent?

The ALJ outlined the history of accident in her Order and stated that “claimant’s testimony is credible and persuasive.”¹⁰ In weighing the conflicting testimony and determining the respective credibility of the witnesses, the Appeals Board takes into consideration that the Administrative Law Judge had the opportunity to personally observe the testimony. In this respect, she had the unique opportunity to observe their demeanor and assess their credibility.¹¹

This Board member agrees that claimant suffered an injury by accident arising out of her employment on July 3, 2012.

2. What was the prevailing factor in claimant’s injury and need for medical treatment?

The bigger question in this claim is whether the injury is the prevailing cause for claimant’s need for medical treatment. Respondent’s liability for compensation under the Workers Compensation Act is limited to personal injuries by accident, repetitive trauma or occupational disease arising out of and in the course of employment.¹² To be compensable, an accident must be identifiable by time and place of occurrence, produce at the time symptoms of an injury and occur during a single work shift.¹³

The accident must be the prevailing factor in causing the injury. “Prevailing factor” is defined as the primary factor compared to any other factor, based on consideration of all relevant evidence.¹⁴ An accidental injury is not compensable if work is a triggering factor or if the injury solely aggravates, accelerates or exacerbates a preexisting condition or

⁹ K.S.A. 2012 Supp. 44-555c(k).

¹⁰ ALJ Order (June 24, 2013) at 2.

¹¹ *Newsom v. Lodging Enterprises, Inc.*, No. 222,875, 1997 WL 556166 (Kan. WCAB Aug. 14, 1997).

¹² See K.S.A. 2012 Supp. 44-501b(b).

¹³ K.S.A. 2012 Supp. 44-508(d).

¹⁴ See K.S.A. 2012 Supp. 44-508(d), (g).

renders a preexisting condition symptomatic.¹⁵ Furthermore, the accidental injury arises out of employment only if there is a causal connection between work and the accident, and if the accident is the prevailing factor causing the injury, medical condition and resulting disability or impairment.¹⁶

Claimant has a long documented history of neck and left shoulder complaints. On September 14, 1999, claimant was examined by Debbie Lancaster, ARNP, at the Bucklin Community Clinic. Claimant complained that her “left shoulder became progressively ‘more sore’ while lifting and turning patients.”¹⁷

On July 20, 2001, claimant went to an emergency room. On July 23 or 24, 2001, claimant followed up with Dr. Bruck. Dr. Bruck wrote that claimant was assisting a patient who had fallen resulting in left trapezius and shoulder pain and burning. The most significant complaint for the purposes of a prevailing factor analysis is claimant complained of numbness in her left arm and left leg. Dr. Bruck questioned the etiology of claimant’s pain for not being neurologically consistent.

On September 11, 2003, claimant was examined by Sarah Butell, PA-C, at the Hutchinson Medical Clinic. Ms. Butell’s notes contained a history of two auto accidents in 1984 and 1997 causing pain in the neck and left shoulder. The medical record also notes a 1992 left shoulder injury that occurred while claimant was working for Excel meat plant.

A July 28, 2005, Hutch Clinic note indicates significant neck pain from prior injuries. An August 28, 2006, report notes pain in neck and back since age of 17. The current complaints were described as pain in back of head as well as neck, shoulder and middle of low back, and numbness in both hands.

Dr. Murati examined claimant on September 4, 2012. Dr. Murati wrote in his report that claimant had pain in the back of her shoulder and the neck area, mostly on the left side. These complaints are identical to claimant’s symptoms noted on September 11, 2003. Dr. Murati also noted tingling down the left arm and left leg. These symptoms are identical to complaints made to Dr. Bruck in 2001. In addition to claimant’s historical neck and left upper extremity complaints which he diagnosed as myofascial pain syndrome, Dr. Murati diagnosed bilateral carpal tunnel syndrome, left lateral epicondylitis. Dr. Murati opined that claimant’s work with the respondent is the prevailing factor for all of her diagnosed conditions.

¹⁵ K.S.A. 2012 Supp. 44-508(f)(2).

¹⁶ K.S.A. 2012 Supp. 44-508(f)(2)(B).

¹⁷ P.H. Trans., Resp. Ex. 1 at 40.

Dr. Estivo examined claimant on November 9, 2012. Dr. Estivo opined that claimant was dealing with a preexisting condition. He stated that the prevailing factor causing claimant's symptoms was the preexisting chronic cervical spine pain and left upper extremity pain and numbness she has had for many years. He also wrote that claimant did not need any medical treatment in relation to the injury.

The undersigned finds Dr. Estivo's opinions to be more persuasive. Dr. Murati's medical history seems to minimize claimant's preexisting conditions. It also ignores the fact that claimant, for years prior, had the exact same symptoms as those he noted.

CONCLUSION

Claimant's incident lifting a patient was not the prevailing factor causing claimant's need for medical treatment. Claimant's need for medical treatment is due to a preexisting condition.

ORDER

WHEREFORE, it is the finding, decision and order of this Board Member that the Order of Administrative Law Judge Nelsonna Potts Barnes dated June 24, 2013, is reversed.

IT IS SO ORDERED.

Dated this _____ day of August, 2013.

HONORABLE SETH G. VALERIUS
BOARD MEMBER

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